UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Individually and
As Next Friend of JULIE DOE, a minor,

Plaintiffs,

v.

MYSPACE, INC., and
NEWS CORPORATION,

Defendants.

No. 06-cv-7880 (MGC/AJP)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MYSPACE, INC.'S MOTION TO DISMISS

Douglas H. Wigdor (DW 9737)
Scott Browning Gilly (SG 6861)
THOMPSON WIGDOR & GILLY LLP
Empire State Building
350 Fifth Avenue - Suite 5720
New York, New York 10118
Telephone: (212) 239-9292
Facsimile: (212) 239-9001

Jason A. Itkin (JI 8442)
Kurt B. Arnold (KA 8716)
ARNOLD & ITKIN LLP
700 Louisiana Street, Suite 4700
Houston, Texas 77002
Telephone: (713) 222-3800
Facsimile: (713) 222-3850

ATTORNEYS FOR PLAINTIFFS

Dated: November 6, 2006

Dockets.Justia.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. FACTS 3

III. The Communications Decency Act Does Not Apply 3

A. The CDA is a Free Speech Statute, Not a Tool to Insulate MySpace's Total Disregard for Child Safety. 4

B. The Cases Cited By MySpace Are Basically Defamation Cases, Which Are Inapposite to Plaintiff's Claims 7

IV. Plaintiffs' Claims are Viable Under Both New York and Texas Law 9

A. New York law should govern this case. 10

B. MySpace owed Julie Doe a duty to institute reasonable safety measures to protect her from sexual predators, particularly given that MySpace was aware of the dangers posed to minors using its website. 11

C. MySpace's "new and independent cause" defense is untenable, and provides no basis for dismissal of Plaintiffs' claims. 12

V. Plaintiffs' Fraud and Negligent Misrepresentation Claims are Pled With Sufficient Particularity. 13

VI. The Terms of Use Agreement and Tips for Parents found on MySpace's Website Do Not Defeat Plaintiffs' Misrepresentation Claims. 14

VII. CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Batzel v. Smith
333 F.3d 1018, 1026-30 (9th Cir. 2003)) 4, 7

Carafano v. Metrosplash.com, Inc.
339 F.3d 1119, 1121, 1122 (9th Cir. 2003)) 4, 7, 8

Hamilton v. Beretta U.S.A. Corp.
96 N.Y.2d 222, 233 (N.Y. Ct. App. 2001) 11

In re Leslie Fay Companies, Inc. Securities Litigation
918 F.Supp. 749, 767 (S.D.N.Y. 1996) 14

Ligon ex. Rel. Ligon v. Spring Creek Assoc.
791 N.Y.2d 870, 2004 WL 1587449 (N.Y. Sup. App. 2004) 13

Lofton V. Texas Brine Corp.
777 S.W.2d 384, 387 (Tex. 1989) 11

Perez v. Weingarten Rlty. Investors
881 S.W.2d 490, 496 (Tex.App.—San Antonio 1994, writ denied) 13

Phoenix Ref. Co. v. Tips
81 S.W.2d 60, 61 (Tex. 1935) 12

Porat v. Lincoln Towers Community Assoc.
464 F.3d 274, 276 (2d Cir. 2006) 14

Prickett v. InfoUSA, Inc. et al.
2006 WL 887431 (E.D. Tex. Mar. 30, 2006) 4, 8, 9

Rodriguez v. Moerne
963 S.W.2d 808, 820-21 (Tex. App.—San Antonio 1998, pet. denied) 12, 13

Scott v. Mead
517 N.Y.S.2d 320 (N.Y.Sup.App.Div. 1987) 13

Stratton Oakmont, Inc. v. Prodigy Servs. Co.
1995 WL 323710 (N.Y. Sup. Ct. May 25, 1995) 5, 6

Topheavy Studios, Inc. v. Doe

2005 WL 1940159 (Tex.App.—Austin Aug. 11, 2005) 14, 15

Walker v. Harris
924 S.W.2d 375, 377 (Tex. 1996).. 11, 12

Zeran v. America Online, Inc.
129 F.3d 327-334 (4th Cir. 1997) 4, 5, 8

STATUTES

47 U.S.C. § 230 .... 4, 5

RULES

FED. R. APP. P. 9(b).. 13

OTHER

67 N.Y. JUR. 2D INFANTS § 39 14

RESTATEMENT (SECOND) TORTS § 448 (1965)... 12

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT MYSPACE, INC.'S MOTION TO DISMISS

Plaintiffs Jane Doe, Individually as next friend of Julie Doe, a minor, respectfully requests that this Honorable Court deny MySpace's Motion to Dismiss. The Court should deny the motion because:

1) The Communications Decency Act is inapplicable to Plaintiffs' claims and provides MySpace no immunity in this case;

2) Regardless of whether New York or Texas common law governs this case, both contemplate liability for MySpace's conduct;

3) Plaintiffs' fraud and negligent misrepresentation claims satisfy the federal pleading requirements; and

4) Plaintiff Julie Doe, a 13 year-old minor, cannot be held to MySpace's Terms of Use Agreement; and even if she could, the agreement does not release MySpace from liability for its misrepresentations.

I.

INTRODUCTION

In this case of first impression, Julie Doe, an innocent 14 year-old girl, was raped because MySpace failed to provide any reasonable safety measures to prevent sexual predators from communicating with minors on its website.[1] Unfortunately, numerous other young girls have suffered the same fate as Julie as result of MySpace's conduct. This rash of sexual assaults has been well-documented, leading numerous states' attorneys general to demand that MySpace institute security measures and age verification mechanisms to protect the millions of minors who frequent their website. Tragically, MySpace's reaction has been too slow and ineffective, leading to more sexual assaults like this one.

---

[1] The facts of Julie Doe's sexual assault by Pete Solis, an older MySpace member, is described in detail in *Plaintiffs' Original Complaint*, which is incorporated by reference.

Plaintiffs filed this suit against MySpace for negligence and other causes of action stemming from its failure to institute reasonable measures to prevent sexual predators and older MySpace uses from communicating with minors like Julie Doe. MySpace is now trying to hide behind the Communications Decency Act of 1996 (the "CDA"), asserting that the CDA immunizes MySpace from Plaintiffs' claims. However, the CDA, which is a content-based statute enacted to protect free speech, has absolutely nothing to do with preventing sexual predators from being able to freely communicate with young teens on MySpace's website. The CDA has never been applied to claims like those asserted by Plaintiffs because neither it nor any other statute immunizes a party for knowingly providing a dangerous environment where sex offenders can routinely contact and assault minors.

MySpace's other attempts to dismiss Plaintiffs' negligence claims are both without merit and premature, regardless of whether New York or Texas law governs this case. Further, and despite MySpace's assertions to the contrary, Plaintiffs plead their fraud and negligent misrepresentation claims with particularity. Finally, MySpace argues that Plaintiffs' misrepresentation claims should be dismissed because 13 year-old Julie Doe was warned of the dangers posed by the website, but agreed to the terms of the MySpace user agreement at her own peril. Notwithstanding the fact that the supposed agreement is cannot be enforced against Julie Doe because she is a minor, the agreement does not exonerate the company from its highly publicized misrepresentations about its website's safety.

Thus, Plaintiffs ask the Court to deny MySpace's Motion to Dismiss and allow this important case to proceed.

II.

FACTS

By the time Julie Doe was raped by an older MySpace user on May 12, 2006, countless incidents involving sexual assaults of minors contacted by sexual predators through MySpace's website had occurred. *See Plaintiffs' Original Complaint*, pp. 6-10. As a result of the considerable media attention surrounding these assaults, numerous states' attorneys general contacted MySpace and its parent company, News Corporation, imploring the companies to institute safety measures to prevent communication between sexual predators and young teenagers. *See id.*, pp. 9-10, and Exhibits A-C. Virtually all of the attorneys general who contacted MySpace expressed concern over the lack of any legitimate age verification system and the vast use of MySpace by minors. *See id.* Most suggested that MySpace be limited to users over the age of 18, and that credit card verification be required for all members at sign-in. *See id.* For a company worth nearly $650 million, it would have been easy for MySpace to institute these reasonable safety measures. Sadly, MySpace failed to do so. The results were catastrophic for Julie Doe and numerous other young girls who were found, pursued, and brutally raped by sexual predators lurking on the MySpace website.

It was not until after the filing of this lawsuit, that MySpace began taking steps to protect minors from sexual predators on its website.

III.

THE COMMUNICATIONS DECENCY ACT IS NOT APPLICABLE

The CDA has no bearing on this case. It was enacted to ensure that free speech is promoted on the internet by immunizing interactive computer services ("ICS"), such as

MySpace, from being treated as "publishers" of the information on their websites that is provided by third parties. The CDA does not, however, permit MySpace to knowingly allow sexual predators to communicate with minors by failing to utilize reasonable safety measures. Neither the plain language of the CDA nor any case that interprets it suggests that the Act effects Plaintiffs' claims. As a result, MySpace's motion to dismiss should be denied.

A. The CDA is a Free Speech Statute, Not a Tool to Insulate MySpace's Total Disregard for Child Safety.

Congress enacted the CDA for "two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (citing *Batzel v. Smith*, 333 F.3d 1018, 1026-30 (9th Cir. 2003)). With respect to the first policy (free speech), the CDA reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider." 47 U.S.C. § 230(c)(1). "Through this provision, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano*, 339 F.3d at 1122; *Prickett v. InfoUSA, Inc. et al.*, 2006 WL 887431, at *4 (E.D. Tex. Mar. 30, 2006) (emphasis added). "As a result, Internet publishers are treated differently from corresponding publishers in print, television and radio." *Carafano*, 339 F.3d at 1122 (citing *Batzel*, 333 F.3d at 1026-27). In other words, Congress intended that Internet services, unlike other media, receive immunity from defamation and related actions for publishing material provided by third parties to avoid any chilling effect on free speech. *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). As *Zeran* explains, Section 230 (c)(1), by its plain language, ensures that an Internet service is not treated as a "publisher" of information provided by third parties:

> Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to holding a service provider liable for its exercise of a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.

Id. at 330. Simply put, Section 230(c)(1) is a content-based provision enacted by Congress to protect free speech . As explained more fully below, it is inapplicable in this case because Plaintiffs are not suing MySpace for the publication of third-party content; rather, Plaintiffs' claims rest on MySpace's failure to implement basic safety measures to prevent sexual predators from finding and communicating with children who are on the website.

The second purpose of the CDA, the encouragement of voluntary monitoring of offensive material, is effectuated by the following language:

> No provider or user of an interactive computer service shall be held liable on account of--
>
> any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2)(A). Congress enacted this provision to "encourage service providers to self-regulate the dissemination of offensive material over their services." *Zeran*, 129 F.3d at 331. In fact, Section 230(c)(2)(A) represents Congress's direct response to the holding in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 25, 1995). *Id.* In *Stratton*, the plaintiff sued AOL for defamatory comments made by an unidentified party on one of Prodigy's bulletin boards.

Id. The court held Prodigy to the strict liability standard normally applied to original publishers of defamatory statements because Prodigy controlled the content on its service and actively screened and edited messages posted on its bulletin boards. *Id.* Congress enacted subsection (c)(2)(A) to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision:

> Under [*Stratton*], computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service in the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." **In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.**

Id. Normally, any alteration of content would subject the service provider to defamation liability as a "publisher." *Id.* Congress enacted the CDA so that Internet services could edit and restrict content without becoming a publisher. Stated differently, Section 230 was enacted because Congress wanted internet services to self-regulate the content posted on their websites by third parties, which under typical circumstances, would subject them to liability for defamation actions based on such content.

Section 230(c)(2)(A) has absolutely nothing to do with Plaintiffs' claims because Plaintiffs' claims are not based on MySpace's liability for the content of information provided by third parties. Rather, Plaintiffs sued MySpace for allowing sexual predators to regularly communicate with children on its website. Neither the plain language of the CDA nor the cases interpreting it contemplate the extension of the CDA's immunity sought by MySpace.[2] In fact, each case relied on by MySpace in its motion to dismiss involves a defamation or related action based on content provided by third parties.

B. The Cases Cited By MySpace Are Basically Defamation Cases, Which Are Inapposite to Plaintiff's Claims.

MySpace relies on three opinions to support its flawed argument to extend the reach of the CDA to this case: *Carafano*, *Zeran*, and *Prickett*. None of these cases suggests that the CDA is applicable to Plaintiffs' claims. Rather, each confirms that the CDA merely immunizes companies like MySpace from defamation and related actions for content provided by third parties.

In *Carafano*, a TV star (Christine Carafano) sued the owner of Matchmaker.com when an anonymous user posted a false on-line personal ad in Carafano's name seeking sexual partners. 339 F.3d at 1121. The ad listed Carafano's home address and phone number, and shortly after it was posted, she began receiving offensive telephone calls and letters. *Id.* at 1121-22. Carafano filed suit for invasion of privacy, defamation, and negligence based on the defendants' posting of the third-party content. *Id.* In dismissing the case based on the CDA, the Ninth Circuit succinctly stated the basis of Carafano's claims at the outset of its opinion: "In this appeal, we consider to what extent a computer match making service may be legally responsible for false content in a dating profile provided by someone posing as another person." *Id.* at 1120. Of course, that is not the issue in this case. Plaintiffs claims are not based on MySpace's posting of third-party content, but on MySpace's failure to institute safety measures to prevent sexual predators from communicating with minors.

---

[2] The Internet is a unique medium because it allows its users to both access information (like traditional media), and to use website domains and chat rooms to directly communicate with each other (unlike traditional media). The CDA is designed to protect ICSs from claims based on the first aspect of the Internet. In other words, the CDA prevents an ICS from being liable for traditional defamation and related actions for posting information provided by third parties that it edits, whereas a newspaper or magazine does not receive such immunity. *See Carafano*, 339 F.3d at 1122 (citing *Batzel*, 333 F.3d at 1026-27).

However, the CDA does not address the second aspect of the Internet; nor should it. The Internet is the only place in the world where sexual predators can anonymously communicate with minors. Thus, ICSs such as MySpace must institute safety measures to ensure that such communication does not occur. It is the lack of these measures that is at issue here.

The same can be said for *Zeran*. In that case, the plaintiff (Zeran) sued AOL when it failed to remove a post from an unidentified user who falsely claiming that Zeran was selling shirts and keychains containing tasteless slogans regarding the tragic bombing of the Oklahoma City federal building. 129 F.3d at 328-29. The ad listed Zeran's phone number and he soon began receiving threatening phone calls. *Id.* As in *Carafano*, Zeran sued AOL for failing to remove defamatory messages posted through AOL's Internet service: "In this respect, Zeran seeks to impose liability on AOL for assuming the role for which § 230 specifically prescribes liability – the publisher role." *Id.* at 328.[3] Again, the *Zeran* situation is not even remotely analogous to the issue in this case, where Plaintiffs' claims concern MySpace's role not as a publisher, but as a provider of a direct means of unprotected communication between its young members and sexual predators.

Prickett is also inapposite. In *Prickett*, the plaintiffs sued various Internet services for defamation, invasion of privacy, and negligence when the plaintiffs' address and phone number were incorrectly published under the heading for "Adult-Entertainment." 2006 WL 887431, at *1. As a result of the incorrect listing, the plaintiffs received numerous offensive and threatening phone calls, and were even investigated by Child Protective Services. *Id.* As in *Carafano* and *Zeran*, the plaintiffs alleged that "they were harmed by third party content and that the Defendant is liable for failing to verify the accuracy of the [third-party] content." *Id.* at *5. The court held that the claim was barred by the CDA, explaining "that any such claim [by Plaintiffs] necessary treats the [Defendant] as 'publisher' of the content and is therefore barred by § 230." *Id.*

---

[3] *Zeran* provides an insightful discussion of the policy reasons behind the CDA, and makes clear that immunity under the CDA, although broad, is designed to protect Internet services from claims that place them in a publisher's role. 129 F.3d at 330-34.

In none of these cases was the claim at issue based on the Internet Service's provision of an environment where sexual predators could directly communicate with minors with no legitimate safety checks. Rather, each case was based on the effect of listing third-party content without taking into account its defamatory or inaccurate nature.

Here, Plaintiffs are not alleging that they were harmed by third-party content. Rather, Plaintiffs' were harmed by the fact that MySpace knowingly provided sexual predators unfettered access to young Julie Doe. Free speech is not an issue in this case; the safety of young teens is, however. No Court has ever applied the CDA to claims like those asserted by Plaintiffs and Congress simply did not intend the CDA to extend to such claims. Applying the CDA in this case would essentially provide a green light to Internet Services to completely ignore serious safety issues created by their websites. As such, MySpace's Motion to Dismiss should be denied.

IV.

PLAINTIFFS' CLAIMS ARE VIABLE UNDER BOTH NEW YORK AND TEXAS LAW

MySpace incorrectly argues that Texas substantive law governs this case, and such law bars Plaintiffs claims because: (1) MySpace has no duty to institute security measures to protect minors from sexual predators, and (2) Pete Solis's actions constitutes a "new and independent" cause that destroys any causal connection between MySpace's conduct and Julie Doe's injuries. MySpace's defenses are untenable under both Texas and New York law. Thus, the Court should deny MySpace's motion, regardless of which state law applies to this case.

A. New York law Should Govern This Case.

A complete analysis of this case reveals that New York law should be applied to this case even though the rape took place in Texas. First, the tort at issue (MySpace's failure to institute reasonable safety measures to protect its young users) stemmed from New York. News Corporation, which owns and runs MySpace, is based in New York and decisions about safety emanated from here. Second, MySpace has millions of members who live in New York. Thus, the citizens of New York have a vested interest in MySpace's security measures. More importantly, at least five other minor Plaintiffs who were sexually assaulted due to MySpace's tortious conduct will soon intervene in this case. At least one of these Plaintiffs lives in the State of New York and was raped here.

Given MySpace's inherent contacts to the State of New York, and the vested interest New York citizens have in adjudicating the conduct of its businesses and claims directly affecting it teenagers, New York law should govern the case. This is especially true when the various Plaintiffs reside in several different states. It would make no sense to apply the law of each Plaintiff's home state in a single proceeding in New York.

B. MySpace owed Julie Doe a duty to institute reasonable safety measures to protect her from sexual predators, particularly given that MySpace was aware of the dangers posed to minors using its website.

MySpace relies on Texas's premises liability laws to argue that it had no duty to protect Julie Doe from the criminal acts of Pete Solis.[4] Although completely incorrect, MySpace's argument brings up an interesting point, which is that its website is very much a "cyber premises" where people directly communicate with each other. It is not merely a publication, such as a newspaper or a magazine. Thus, under Texas common law, MySpace owed Julie Doe a duty to institute reasonable safety measures to protect her from sexual predators because, based on the astounding number of attempted and successful sexual assaults against young MySpace members, it was foreseeable that she could be injured by the criminal acts of an older MySpace member.

The Texas Supreme Court has clearly stated that although as "a general rule, a person has no legal duty to protect another from the criminal acts of a third person or control the conduct of another," a duty exists when such criminal acts are foreseeable. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).[5] The Court has also explained that "evidence of specific previous crimes on or near the premises may raise a fact issue on the foreseeability of criminal activity." *Id.* New York law is virtually identical. *See Hamilton v. Beretta U.S.A. Corp*, 96 N.Y.2d 222, 233 (N.Y. Ct. App. 2001) (holding that a defendant can be liable for the criminal acts of others when such acts are a foreseeable consequence of its negligence).

---

[4] Because Texas law and New York law yield the same result with regard to MySpace's assertions that it had no duty to protect Julie Doe from sexual predators and Pete Solis's criminal act constituted a "new and independent cause," those defenses are analyzed under Texas law below. New York cases are also cited to demonstrate the consistency between New York and Texas law regarding these issues.

[5] Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable. *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 387 (Tex.1989).

Plaintiffs' Complaint alleges a litany of sexual assaults perpetrated by MySpace users against its younger members in which MySpace provided the environment that facilitated these tragic crimes. *See* Plaintiffs' Original Complaint, pp. 6-8. Without question, it was foreseeable that the same fate could befall other vulnerable MySpace users such as Julie Doe.[6] Thus, MySpace had a duty to institute reasonable safety measures to prevent contact between sexual predators and minors on its website.[7] MySpace's motion to dismiss based on no duty should be denied.

C. MySpace's "new and independent cause" defense is untenable, and provides no basis for dismissal.

MySpace's argument that Solis's actions constitute a "new and independent cause" that absolves MySpace from liability in this case also lacks merit. A "new and independent cause" is an act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection between the negligent act or omission of the defendant and the injury complained of, and thus becomes the immediate cause of the injury. *Rodriguez*, 963 S.W.2d at 820-21; *Phoenix Ref. Co. v. Tips*, 81 S.W.2d

---

[6] MySpace's assertion that the duty to protect a person from the criminal acts of another arises only in employer-employee, parent-child, and independent contractor-contractee relationships is flat wrong. *See MySpace's Motion to Dismiss*, p. 16. n.65. The San Antonio Court of Appeals' opinion in *Rodriguez v. Moerne* holds that a duty exists any time a criminal act is the foreseeable result of the tortfeasor's negligence. 963 S.W.2d 808, 820-21 (Tex.App.—San Antonio 1998, pet. denied); *see also Walker*, 924 S.W.2d at 377; *see* also RESTATEMENT (SECOND) TORTS § 448 (1965).

[7] Plaintiffs also point out that MySpace's argument is that Plaintiffs' failed to state a claim against it under 12(b)(6) based on the absence of a duty to Julie Doe. It is beyond dispute, however, that a duty exists if the crime at issue was foreseeable. *See Rodriguez,* 963 S.W.2d at 820-21; *Walker*, 924 S.W.2d at 377. Thus, the real issue is whether MySpace has conclusively established that the crime was not foreseeable. *Id.* Even if MySpace could do so (which Plaintiffs' Complaint belies), it is premature to conduct this summary judgment-style inquiry in a 12(b)(6) motion before any discovery has taken place.

60, 61 (Tex. 1935); *Perez v. Weingarten Rlty. Investors*, 881 S.W.2d 490, 496 (Tex.App.—San Antonio 1994, writ denied). In addition, a "new and independent cause" is an inferential rebuttal reserved for determination by the jury. *Perez*, 881 S.W.2d at 496. Like the duty element analyzed above, the premise rests on whether the supposed "new and independent cause" was foreseeable to the tortfeasor. *Rodriguez*, 963 S.W.2d at 820-21.[8]

As previously set forth, there is abundant evidence that MySpace knew of the serious dangers its website posed to its young members before Julie Doe was raped on May 12, 2006. *See* Plaintiffs' Original Complaint, pp. 6-10, and Exhibits A & B. Nonetheless, MySpace failed to institute reasonable safety measures to prevent direct communication between young children and older sexual predators. *Id.* Thus, MySpace's alleged "new and independent cause" defense should be disregarded, especially at this early juncture.

V.

PLAINTIFFS' FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS ARE PLED WITH SUFFICIENT PARTICULARITY.

Plaintiffs' fraud and negligent misrepresentation claims are pled with detailed particularity and easily satisfy FED. R. CIV. P. 9(b). Rule 9(b) states that in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This rule was enacted to ensure that defendants are put on fair notice of the misrepresentation claims asserted against them. *In re Leslie Fay Companies, Inc. Securities Litigation*, 918 F.Supp. 749, 767 (S.D.N.Y. 1996). Plaintiffs undoubtedly gave fair notice of its claims to MySpace in this instance.

---

[8] Strangely, MySpace offers a short quote from the *Rodriguez* opinion in its motion to dismiss to provide the definition of "new and independent cause." But, a complete review of the causation discussion and holding in *Rodriguez* proves that MySpace's motion to dismiss should be denied. *See* 963 S.W.2d at 820-21. New York law renders the same result. *See Scott v. Mead*, 517 N.Y.S.2d 320 (N.Y. App. Div. 1987) (holding that an act by a third party is not a new and independent cause when the act is a foreseeable consequence of the defendant's negligence); *Ligon ex. rel. Ligon v. Spring Creek Assoc., L.P.*, 791 N.Y.2d 870, 2004 WL 1587449, at *2 (N.Y. App. Div. 2004) (same).

Plaintiffs' identified numerous instances in which MySpace and its executives represented to the public through the media that the website was safe and unavailable to minors under 14 years of age. *See Plaintiffs' Original Complaint*, pp. 5-6. Plaintiffs then incorporated those paragraphs directly into their fraud and negligent misrepresentation claims, in which they allege that they relied on the misrepresentations made by MySpace and its executives. These allegations fairly notify MySpace of the misrepresentations at issue, and therefore, satisfy Rule 9(b).[9]

VI.

THE TERMS OF USE AGREEMENT AND TIPS FOR PARENTS FOUND ON MYSPACE'S WEBSITE DO NOT DEFEAT PLAINTIFFS' MISREPRESENTATION CLAIMS.

MySpace's final ground for dismissal is truly bizarre. It argues that regardless of MySpace's repeated misrepresentations to the public with respect to the purported safety of its website, the Terms of Use Agreement and Tips for Parents on the site somehow exonerate MySpace from liability. MySpace's position is invalid for a variety of reasons.

First and foremost, Julie Doe was 13 years old when she began using MySpace. It is well-settled under both Texas and New York law that an agreement between a minor and adult is voidable by the minor. *See Topheavy Studios, Inc. v Doe*, 2005 WL 1940159, at *4 (Tex.App.—Austin Aug. 11, 2005); 67 N.Y. JUR. 2D INFANTS § 39. Even if the minor misrepresents her age, the adult party to the contract cannot prevent the minor

[9] Second Circuit law strongly favors the liberal grant of an opportunity to replead claims subject to dismissal under Rule 12(b)(6). *Porat v. Lincoln Towers Community Assoc.*, 464 F.3d 274, 276 (2d Cir. 2006). Thus, if the Court determines that Plaintiffs' misrepresentation claims are inadequately pled, they ask for the Court for an opportunity to replead them.

from voiding it unless the party proves that it justifiably relied on the misrepresentation and was injured as a result. *Id.*

MySpace cannot seriously argue that it justifiably relied on Julie Doe misrepresenting her age or that it was injured as a result. First, even assuming the Terms of Use Agreement is a contract, the MySpace user can simply click "OK" without ever reading its terms. MySpace has offered no evidence that Julie Doe read the Terms of Use of Agreement or understood its terms. Moreover, MySpace was fully aware that there were no age verification mechanisms on its website, and that minors frequently lied about their ages to use the site. MySpace was not injured by these misrepresentations; but instead wildly profited from them by increasing membership and the advertising value of the website. *Topheavy* explains that in this scenario, a defendant cannot establish justifiable reliance, especially as a matter of law, as MySpace apparently seeks to do here. 2005 WL 1950159, at *4.

Second, MySpace's argument that the fine print in its Terms of Use of Agreement and Tips for Parents somehow exonerates it for its executives' repeated public assurances[10] that MySpace is safe for young members is unavailing. There is no legal basis for this contention. MySpace fraudulently and negligently misrepresented the safety of its site for young teenagers. Julie Doe, and many other innocent teens justifiably relied on these misrepresentations, and paid a horrible price as a result. MySpace's contention that these victims were "warned" by an ineffective User Agreement but chose to proceed at their own peril is without merit, and provides no basis for dismissal.

---

[10] These misrepresentations are not merely allegations in the Complaint as MySpace asserts. *See MySpace's Motion to Dismiss*, p. 21, n.24. They are verified facts documented in credible newspapers and magazines. *See Plaintiffs' Complaint*, pp. 4-6.

VII.

CONCLUSION

The Court should deny MySpace's Motion to Dismiss and allow this important case to proceed.

Respectfully submitted,

By: ______________________

Douglas H. Wigdor (DW 9737)
Scott Browning Gilly (SG 6861)
THOMPSON WIGDOR & GILLY LLP
Empire State Building
350 Fifth Avenue - Suite 5720
New York, New York 10118
Telephone: (212) 239-9292
Facsimile: (212) 239-9001

Jason A. Itkin (JI 8442)
Kurt B. Arnold (KA 8716)
ARNOLD & ITKIN LLP
700 Louisiana Street, Suite 4700
Houston, Texas 77002
Telephone: (713) 222-3800
Facsimile: (713) 222-3850

ATTORNEYS FOR PLAINTIFFS

Dated: November 6, 2006

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2006, this document was served via facsimile and certified mail, return receipt requested, to the following counsel of record:

Clifford Thau
Ari M. Berman
Hillary L. Preston
Ronald Oran
Vinson & Elkins, L.L.P.
666 Fifth Avenue, 26th Floor
New York, NY 10103-0040

Michael D. Marin
Susan Denmon Gusky
Christopher V. Popov
Vinson & Elkins, L.L.P.
The Terrace 7
2801 Via Fortuna, Suite 100
Austin, Texas 78746
Attorneys for Defendant Myspace, Inc.

Adam J. Loewy
Carl R. Berry
Barry & Loewy LLP
One Congress Plaza
111 Congress Avenue, Suite 400
Austin, Texas 78701
Attorneys for Plaintiffs

Scott Browning Gilly